No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING CO. (a corporation), PACIFIC INDEMNITY COMPANY (a corporation) and MARYLAND CASUALTY COMPANY (a corporation),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and benefit of Soule Steel Company (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

DION R. HOLM,
206 City Hall, San Francisco,
HENRY F. WRIGLEY,
1029 Monadnock Building, San Francisco,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Texts

No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING CO. (a corporation), PACIFIC INDEMNITY COMPANY (a corporation) and MARYLAND CASUALTY COMPANY (a corporation),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and benefit of Soule Steel Company (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

We will answer Appellee's arguments under the headings adopted by it.

A.

THERE IS NO CONFLICT IN APPELLANTS' CONTENTION AS TO THE MEANING OF THE CONTRACT.

Point One in our opening brief (p. 22) is devoted to establishing that the contract between the Department of Interior (Bureau of Reclamation) and Union Paving Co. merely required the Union Co. to place reinforcement bars where required under the contract, and the subcon-

tract between the parties specifically made it apply to the subcontract. We pointed out in our opening brief that paragraph 66 of the specifications (Ex. T., at p. 35) in part provided as follows:

> "Reinforcement bars shall be accurately *placed and secured in position so that they will not be displaced during the placing of the concrete,*"
>
> * * * * * * *
>
> "the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, *placing, and securing and maintaining in position all reinforcement bars.*"

and we quoted from paragraphs 23, 24, 45 and 66 of the subcontract. Paragraph 66 is similarly numbered in the original contract between Union Paving Co. and the Department of Interior.* Appellee states that we rely upon the doctrine of *expressio unius est exclusio alterius,* which is quite true and quotes the following excerpt from our opening brief:

> " 'If it were not intended under the subcontract that the Soule Company was not to build the falsework and interior framework, there was no reason to state that where there were cores in the piers that Union Co. would undertake to build those, and which structures could then be used by Soule to support the reinforcement bars. If Union Co. were supposed to build all the falsework and interior framework, what would have been the purpose of incorporating the section of the contract last quoted?' (App. Br. 27.)" (Soule B. 4.)†

---

*The subcontract may be found in the transcript from pages 13 to 18 inclusive, entitled "Memo of Agreement".

†Appellee's brief hereafter shall be referred to as Soule brief.

Appellee leaves the question above asked unanswered. Then it proceeds to quote from a part of the subcontract to the effect that the subcontractor will proceed wih placing reinforcement bars in sections ready for such placement and claims the contract is ambiguous, as the terms "sections" and "ready for placement" are not defined in the contract.

The subcontract read in connection with the original contract can lead to but one conclusion, namely, that Union was to provide all necessary foundations on which the reinforcement bars were to be erected, as it is set out in Section 66 of the subcontract:

> "The contractor at its own cost agrees to provide and pour necessary concrete sills in the base of all piers sufficient to support reinforcing steel mats."

and as sections of piers or abutments were prepared for the placement of steel, Union was to notify Soule to erect the reinforcement bars. Also, as the steel bars were welded for the next length of bars and the lifts of concrete poured, all this constituted "sections" and "ready for placement". No disputes arose about this language.

This portion of appellee's brief was apparently designed to distract the Court's attention from the fact that counsel for appellee failed to answer the question as to why there should have been inserted in the subcontract the provision that where cores were provided for in piers 3 and 4, the only structures requiring them, that Union Co. would build these timber forms. It seems to us apparent that omitting this provision in the rest of the contract it was the intention of the parties that Soule

should construct the falsework and interior framework on all other parts of the job that was necessary and essential and without which Soule could not have erected the reinforcement bars.

The portion of Finding VIII quoted by Appellee (Tr. p. 53) goes to the essence of this appeal as it seeks to interpret the contract, which interpretation this Court is in no way bound to accept, and is called upon under the authorities referred to in our opening brief (p. 46) to interpret it itself irrespective of what the District Court may have done, taking the contract as it is written from its "four corners".

Appellee has failed to answer the question asked in our opening brief and has merely re-stated our question.

B.

NOTHING IN APPELLANTS' BRIEF OR IN THE EVIDENCE JUSTIFIED TRIAL COURT IN HOLDING THE CONTRACT WAS UNCERTAIN.

Under subdivision (a) of this part of appellee's brief is specified the way Union maintained its books of account, which is admitted, and the Court's attention was called generally to this fact: that on October 15, 1940, charges for the interior framework and falsework were set up by Union, allocating the costs thereof between the parties and after that date maintaining the books similarly until the job was completed.

It is to be noted that on July 29, 1940, there were only 1027 tons of reinforcing steel erected (Pl. Ex. 4, Tr.

p. 83), less than one-fifth of a total of 5533 tons. (Pl. Ex. 9, Tr. p. 89.) In the forepart of this month of July, 1940, Mr. Dowling endeavored, in the presence of Mr. Morisette (Tr. p. 445), to have Mr. Stevens agree as to the equitable setting up of the books prorating the cost of the falsework. Mr. Stevens denies this occurrence and claims it was not until October 15, 1940 that he definitely told Mr. Dowling, Soule would pay for none of the cost of the interior framework, and thereupon Union Paving Co. made its equitable charges on its books consistently with the terms of the contract.

(b) Appellee complains that Union did not consult it about the material purchased and the labor admittedly all paid for by Union and

> "never made any demands of the steel company that they construct the framework".

The record does not bear out this assertion. It is admitted that on October 15, 1940, Soule knew Union was charging it for these materials and labor and it was expected to pay its portion of the cost and as a matter of fact did on October 25, 1940, undertake part of the construction of the falsework. (Tr. pp. 436, 437.) Hence, the appellee's brief is inaccurate in this respect and when Soule refused to bear any portion of the cost of material and labor for the interior framework and falsework, it thereupon became useless to consult with it as to how purchases should be made or what prices should be paid.

(c) Appellee claims it rendered bills for six months to which Union did not object. These bills are found only in forms of estimates, Plaintiff's Exhibits 1 to 9 (Tr.

pp. 80 to 89) and Union did pay in accordance with them, up to September, 1940. (Tr. p. 303.) Thereafter Union did not pay Soule until the latter had caught up with steel placed as compared to the portion of the cost of falsework charged to Soule.

As an example, Plaintiff's Exhibit 1 (Tr. p. 80) shows in March, 1940 there were only 19½ tons installed; in April a total of 115; in May it reached 230 tons, and as of June 29 (Pl. Ex. 4, Tr. p. 83) there was only installed a total of 527 tons of the reinforcing steel, less than 10 per cent of the full 5533 tons of reinforcing bars to be placed.

It was in the month of July that Dowling first questioned Stevens as to how the cost of falsework should be charged.

This appears to us as due diligence on the part of Union's representative to endeavor to prorate its costs. It is to be noted that these estimates are referred to in the transcript and brief of appellee as bills.

On Ocober 15, 1940, when Soule admits knowing of Union's intention of charging for the falsework, there still remained more than 50 per cent of the steel to be placed. Plaintiff's Exhibit 7 (Tr. p. 85) shows a total of 2000 tons of steel and Exhibit 8 (Tr. pp. 85, 86) shows that on October 31, 1940, only 2912 tons of reinforcement bars were in place. It is fair to assume that of the 2912 tons placed in October, half were so placed in the first fifteen days of that month.

(d) Appellee claims Union waited ten months after the contract was signed before a claim was made that Soule was to erect the framework.

On January 6, 1940, the contract was entered into. The work of placing steel began in March (Pl. Ex. 1, Tr. p. 80) and 19½ tons were placed in that month, and in July, 1940 the record shows that Mr. Dowling questioned Mr. Stevens, a partner of Soule, as to the method of charging the cost of the falsework.

"Q. Did you have any discussion with Mr. Stevens with reference to the interior framework or falsework on the piers?

A. I did.

Q. Approximately when did the first discussion come up?

A. Well, the first discussion came up along about in July.

Q. Of what year?

A. Of 1940, early in July. * * *

Q. Give us in substance what you said and what he said at that first conference with reference to the interior falsework or framework?

A. I asked him to sit down with us and adjust or come to some agreement of how the charges for the interior structure should be apportioned. He said he would take it up with San Francisco. Nothing happened until along about in September, again." (Tr. pp. 277, 278.)

At this time, at the end of July (Pl. Ex. 5, Tr. p. 84) but 1027 tons of reinforcement bars were placed, less than a fifth of the total amount. Union had naturally assumed the terms of the contract meant what they said and it would only be charged with the framework about the cores, and Soule the balance. For appellee to claim ten months elapsed before the matter was discussed is mis-

leading to the Court. Morisette confirmed the discussion of July (Tr. p. 445), another was had in September (Tr. p. 277) and the admitted one of October.

An examination of our opening brief fails to disclose that we omitted all or any of the pertinent portions of evidence referred to in subdivisions (a), (b), (c) and (d) of appellee's brief.

(e) We admit no agreement was reached as to the payment of the falsework, and had Soule acted in accordance with his contract, and reasonably, this case would not be before this Court.

(f) It is a fact that on October 12, 1940, when it was apparent Soule would not state the basis on which the cost of the falsework should be proportioned, that the books from the preceding March, showing the sums chargeable to Union and chargeable to Soule for the cost of the falsework were adjusted in accordance with the facts as the books disclosed.

(g and h) These two subdivisions of appellee's brief are directed toward the method of allocating charges rather than to the right to make charges against Soule for the cost of the falsework. It might well be that this Court would take the view that Union did in some respects place too great a burden upon Soule for the cost of the falsework but if this is so this case should be returned to the District Court with instructions to it to determine what was fair. However, an inspection of the total costs, which appellee printed in its brief at pages 14 and 15, shows that Union Paving charged itself with $56,803 and Soule with $61,112 of the total cost of $117,916. This

does not appear to us as arbitrary or unfair and appellee other than making the statement that it is arbitrary fails to show in what respect.

Appellee then has a subdivision of its brief numbered 2, to the effect that inconsistencies and contradictions appear in the opening brief caused by the testimony previously outlined. We are at a loss to find in this portion of the brief where counsel has illustrated even one inconsistency.

Appellee's argument seems to be directed to the fact that it was not charged for all of the cost of the falsework in all piers and abutments. Our brief is quoted to show that Soule was not charged for falsework or temporary supports on abutments 2, 3 and 4, or piers 8, 9 and 10 (Tr. pp. 286, 287, 302) and in the course of its brief endeavors to illustrate that Union charged itself with only 33 1/3 per cent of the cost of all the falsework and charged Soule with 66 2/3 per cent. Figures, we know, may be used peculiarly. The fact is, as shown on appellee's brief, pages 14 and 15, the total cost of the falsework was $117,916, of which $56,803, as we have stated before, was charged to Union and $61,112 charged to Soule. One does not have to deal in mathematics to show that this is not an allocation on the basis of 33 1/3 per cent and 66 2/3. The figures speak for themselves.

Appellee asked by what right did Union charge the costs of the falsework if the parties were unable to reach an agreement up to October 15, 1940, in the proportions we have above indicated and in the proportions of 33 1/3 and 66 2/3 as appellee contends. It asks the further ques-

tion as to what provision in the contract provided for such a division and wherein did it appoint Union Paving Co. to be the arbiter of how the costs should be placed?

All these questions go back again to the reasonableness of the proration of the charges.

We have explained in our opening brief the reasons why for certain piers and abutments no charges were made against Soule. Briefly, it is that none of these tremendous structures, as shown in the pictures in our opening brief between pages 6 and 7 were required on the abutments and piers for which Soule was not charged.

We reiterate that Section 66 of the subcontract (Tr. p. 16) states that Union at its own cost agreed to pay the cost of an accessible roadway to the base of all piers and abutments and construct a wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars.

Unequivocally and without ambiguity the contract states what charges Union shall bear. All other charges for the cost of falsework could be charged 100 per cent against Soule, rather than slightly more than 50 per cent of the cost. So the contract is not silent, and by reference to the specifications between the Government and Union Paving (Df's. Ex. T) which are all made a part of the subcontract between the parties to this action, the drawings attached to these specifications show the different type of construction involved.

No charges were made against Soule for falsework on abutments 2, 3 and 4, or piers 8, 9 and 10. (Tr. pp. 286, 287, 302.) These were all smaller units and the bars were placed in position and rested on rock base or concrete curbs or sills and were self-supporting; they required no welding or falsework to support them; hence no charge for falsework in these structures were made against Soule.

As we stated in our opening brief at page 7, the reinforcement bars placed in abutment 1 and piers 1, 2, 3, 4, 5, 6 and 7 required reinforcement bars used in these piers about 2 inches square and in 60-foot lengths and weighing approximately 900 pounds for each length. They then required welding and falsework or interior framework to support them as they were all placed in a variable oblique or sloping position.

The contract states what Union will pay for in the way of falsework about the cores, leaving the rest of the falsework to be supplied by Soule.

We use the maxim employed by appellee, *expressio unius est exclusio alterius.*

C.

Appellee next goes on to discuss a disputed ruling and testimony introduced as a result of the ruling, and ends the first page of its Argument by stating

> "the evidence objected to was so convincing that it would have justified the reformation of the contract".

It is to be pointed out this is not a suit for reformation of contract. It may well be that Soule should have pursued this remedy. The action at bar is predicated on the contract between Soule and Union. There follows several pages of conversations and happenings, some occurring as early as October, 1939 and referred to a conference held in the hotel in Sacramento in Mr. Dowling's bedroom about midnight while Mr. Dowling was in bed, concerning bids. And then takes us to Los Angeles as to what was done in the Soule office at Los Angeles concerning their figuring of placing reinforcing bars. A so-called "going-in bid" of $33.82 a ton is mentioned and how it was dropped to $28.60, then to $24.80, and finally to $22.50 a ton without any explanation of the reasons for their different bids.

All this testimony of course was objected to. There is set out a series of talks held on December 29, 1940, so appellee states in its brief at page 23, but it means 1939, and these conversations were likewise objected to.

Reference is made to Plaintiff's Exhibit 22. This is supposed to be a sketch of the falsework appellee claims Union should pay for. An examination of this exhibit shows it to be a sketch of Pier 3 and has two short uprights 8″ x 8″; no indication of 10 x 10 and the detail set out in appellee's brief (pp. 23 to 25), and a few lines in red that might indicate most anything or nothing. The drawing entitled "Pier 3, 214-D-2754", a part of the general contract, Defendants' Exhibit T, shows more detail than Exhibit 22, which does not show falsework.

The purpose apparently is to illustrate that Union agreed to a price of $22.50 a ton without any cost of the

falsework to Soule, and a great deal of space is addressed to a letter dated December 11, 1939 from Soule to Union, all of which was objected to as varying the terms of a written contract entered into on January 6, 1940, subsequent to all of the happenings recounted and quoted in appellee's brief.

In our opening brief we have stated the reasons why the consideration of such testimony is not countenanced by the decisions of the Courts of California.

The contract of January 6, 1940 superseded all prior negotiations and was reduced to writing, admittedly read by Mr. Soule of the steel company, a man of wide business experience, and signed by him. That contract constituted the meeting of minds, and all other prior conversations and writings were disregarded.

Appellee reaches the extraordinary conclusion that the testimony quoted by it supported the trial Court's finding that Union Co. was to erect the interior framework and permit Soule to use it without cost. This finding and the conclusion reached by appellee cannot stand, in view of the record in this case.

Appellee (Brief 30) felt it unnecessary to detail the testimony of Alexander Cochrane, a witness called by appellee and who formerly was a superintendent for Union but was relieved of his employment when only 1000 tons out of 5500 tons of reinforcement bars had been placed, or less than one-fifth of this part of the subcontract completed. Severance of Mr. Cochrane with the job occurred in July, 1940. We deem it highly necessary to briefly call attention to the testimony of Alexander

Cochrane, appellee's witness, who admitted that he, in behalf of Union, had a bid for the placing of the reinforcement bars *including the cost of falsework that totaled $24 per ton.* This bid Cochrane had at the time Soule first submitted its bid at Sacramento, and the following is found in the transcript:

"Mr. Wrigley. Q. Mr. Cochrane, just before the recess, as I understood your testimony, you knew Mr. Dowling had consulted you with reference to the various bids he had received from various people for the reinforcing steel and other work up there?

A. Before the bids went in?

Q. Yes.

A. Yes, sir.

Q. No, before the bids went in and after the bids went in.

A. Yes, sir, all the time.

Q. And in particular, he showed you a bid from Sherwood S. Cross, didn't he?

A. I don't recollect of him showing me that bid, but I will say that before the bids were opened in Sacramento we got a bid around $24 from someone around Los Angeles—might have been the same gentleman—but Mr. Dowling didn't know we had that bid, because I considered it way too low to put up that falsework, and he never knew we had that bid until he came back from Sacramento." (Tr. pp. 492, 493.)

There is no reason assigned why Union would disregard a bid for $24 which included the cost of falsework and accept a bid for $22.50, which it is claimed excluded the cost of all the falsework when this item totalled $117,000.

Next appellee epitomizes from its standpoint Mr. Dowling's testimony, which testimony naturally is in conflict with the testimony of Soule and confirms the provisions in the subcontract of January 6, 1940. Stress is laid upon the fact that Dowling was confused as to when the letter of December 11 was presented to him. This of course illustrates Mr. Dowling's honesty, as after three and a half years it is only natural that he would not remember when the letter was presented to him, in view of the fact that a definite and unequivocal contract had been entered into at a later date, namely, the following January 6.

D.

ARGUMENT.

Appellee under this heading argues that the letters (Ex. 21 and 23) of December 11 was sufficient that "a court of equity would be compelled to revise the contract". This is not an action to revise the contract but one for damages predicated on the contract.

We do not challenge the text quoted from 17 C.J.S., pages 744 to 750, but adopt it and state that it is not applicable to this case, as the subcontract is susceptible of but one interpretation, namely, that Union was to pay for the falsework around the cores in the piers and Soule all other falsework charged to it. Hence there was no necessity for the District Court to have admitted extraneous evidence.

The cases cited by appellee have very apparent and latent ambiguity in the contracts under consideration, as in *Balfour v. Fresno C. & I. Co.,* 109 Cal. 221, 41 Pac. 876, the contract failed to state the time when payment was to be made for the uses of water and it was obviously ambiguous as to when the completion of a ditch for the diversion of the water was to have occurred. *Pearsall v. Henry,* 153 Cal. 314, 95 Pac. 154, was a case involving a written contract for the sale of real property based upon first a written agreement which written agreement was thereafter modified by an oral contract that in effect became a novation and the court properly held that the novation was not a modification of the written contract but a new contract and oral evidence of the oral contract was competent. The case of *Joy v. Rousseau,* 17 Cal. App. 179, 236 Pac. 979, involved three written contracts for the sale of a vineyard, assignments of the contracts and particularly what was meant as to "a prorating of interest * * * to be adjusted when interest is received." Obviously such ambiguous language required parol evidence to explain. In *Crawford v. France,* 219 Cal. 439, 27 P. (2d) 645, an architect sought to recover fees based on a contract that contemplated a building "suitable for the needs of the owner". Nothing was provided for in the contract as to what the cost of the building was to be or what was meant by the term needs of the owner. Under such an uncertainty on the face of the contract parol evidence was properly admitted.

Appellee next refers to *Universal Sales Corp. v. Cal. etc. Mfg. Co.,* 20 Cal. (2d) 751, 128 P. (2d) 665. This was an action for declaratory relief and interpretation

of a contract. It involved the purchase and use of machines that produced poultry and animal feed. Questions as to whether this involved contracts, included improvements on the machine, participation in patents obtained before or after the contract was entered into and the gross selling price of future sales from two classes of machines or presses. Cost of operations also entered into an interpretation of the contract. These provisions obviously require parol evidence, as from a reading of the contract the intent of the parties could not be determined.

The next case cited is *Johnstone v. Joint Highway Dist.*, 138 Cal. App. 450, 32 P. (2d) 681. This case would seem to be more in Union's favor than in Soule's as the Johnstone contract based payment on asphalt "in place", meaning just what the words implied and did not mean that the asphalt was to be computed on the amount of asphalt conveyed in wagons.

All of appellee's cases are clearly distinguishable from the existing case, as we again emphasize the Union-Soule contract is unambiguous. It clearly states Union will pay for the falsework around the cores erected in piers 3 and 4 and of course leave the erection of the rest of the job to Soule. The intention of the parties is contained in the written document and the consistent efforts on Dowling's part to have the cost of the falsework properly apportioned, coupled with his notification that Soule was to pay this cost, as early as July 1940, and the actions of Union in refusing to pay moneys claimed due by Soule, for the falsework during the execution of the con-

tract, all tend to the interpretation of this document as contended by appellants.

Next in its brief appellee has a caption:

REPLY TO POINT TWO.

This refers to our claim that L. E. Stevens, a partner of Soule, testified (Tr. p. 423) that spacers used in the falsework and stiffeners had no use in pouring concrete. This included lumber, bolts, nails and other materials. The cost of all these was included within the cost of the falsework and Union at the time of trial naturally was unable to segregate them. They, however, admittedly remain an obligation of Soule's.

In its next point of the brief entitled:

REPLY TO POINT THREE.

Appellee says it cannot decipher or understand appellants' argument under Point Three of our brief yet thereafter proceeds to make an answer to it. To restate our position, it may briefly be said, as we stated in our opening brief, the two remedies for appellee, apart from seeking to have the contract reformed were: (1) That it might have treated the contract as rescinded and ceased work thereunder and sued for the value of labor and materials furnished to the date of the alleged breach justifying the rescission, or (2) It might have proceeded with the contract and advised the Union Co. it intended to complete the contract, reserving its right to claim damages on the completion of the contract.

Appellee glosses over the first part of our subdivision 2 of remedies in which we say it might have proceeded

with the contract *and advised* the Union Co. of its intention to do so and then claim damages. Nowhere in the record is there any evidence whatsoever of Soule advising Union of its intention to seek damages either in July, September or on or after October 15, 1940 when it knew it was to be charged and was being charged with the falsework. *Soule even accepted two payments after October 1940, one on January 18, 1941* (Tr. p. 95) *and the other as late as December 31, 1941.* (Tr. p. 59.) *The former in the sum of $20,000, and the latter for $16,000 in accordance with Union's interpretation of the contract.* Not having advised Union of its intention to do so, it was placed in the position that it had to rescind the contract. The only billing that Soule made or gave Union or statements rendered were those contained in Plaintiff's Exhibits 1 to 16 inclusive (Tr. pp. 80 to 88) entitled "Estimate". An interpretation of these shows conclusively it was only a statement of the actual tons of reinforcement bars placed, charged at the bid price. No other notice. Cases cited by appellee indicate a notice of some kind is required as appears from the following.

In *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 P. 929, where defendant was supposed to furnish proper lumber for the plaintiff to construct a tunnel, the tunnel caved by reason of poor timber furnished by defendant and who after the cave-in refused to supply other timber or pay for the cost of the extra damages, the plaintiff properly recovered. It is to be noted in that case at page 63 "That the contractor complained of the inferior quality of the timber which defendant persisted in delivering to him, and of the inadequacy of the timber work which the engineers directed should be done, all without avail; * * *."

Nothing in the way of complaint to Union during the course of the Soule contract was made by reason of the falsework being charged against it or for failure to pay installments that would have been due if the falsework had not been charged for as it was. In fact Soule accepted two payments after the contract had been completed.

In *Sobelman v. Maier,* 203 Cal. 1, 262 P. 1087, we find at page 8 of that decision that not only one written demand was served on defendants for past breaches of contract but that a second writing was likewise served in which plaintiffs advised defendants of their failure to fulfill the contract and plaintiffs had elected to hold defendants responsible.

In *O'Connell v. Federal Outfitting Co.,* 5 Cal. App. (2d) 327, 42 P. (2d) 1070, it was found at page 329:

> "On December 31, 1931, plaintiff terminated the contract and brought this action."

The next case cited by appellee is *King Features v. KMTR,* 29 Cal. App. (2d) 247, 84 P. (2d) 322. We find on page 249 "That on or about the 13th day of April, 1937, defendants advised plaintiff that they for some time prior thereto had not been using the wire service and news reports furnished to them under said contract, and did not intend to use" them. And we find that plaintiff in that action refused to accept (p. 250) final payments offered in full settlement.

And in the final California case cited on this point, of *Dyer Bros. v. Central Iron Wks.,* 72 Cal. App. 202, 237 P. 386, it is found at page 206:

> "and on September 12, 1916, the third appellant, served notice on the respondents that they respectively

withdrew from the contract and would not thereafter be bound by any of the terms of said contract."

This last cited case seems to be in favor of our contention, if it is applicable at all.

The three remaining cases of *Roebling Sons Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, *Indiana L. E. Co. v. Carnithan*, 109 N. E. 851, and *United Press Assn. v. Nat'l Newspaper Assn.*, 227 Fed. 193 (Colorado), need not be discussed as they are from jurisdictions other than California. The deicsions of this and the California Courts prevail.

The cases of *Wenzel & Henoch Const. Co. v. Metropolitan Water Dist.*, 115 F. (2d) 25, and *Transbay Const. Co. v. City and County of S. F.*, 134 F. (2d) 468, clearly state what the law of California is on the doctrine of rescission. These cases coupled with those cited in our opening brief lead to the conclusion it was incumbent upon Soule to have rescinded its contract or, if it desired to continue the contract as written and understood by Union, to advise the latter Soule had a different interpretation of the contract and intended to enforce this unfair and erroneous view. To our authorities cited in our opening brief, sustaining the proposition that a written contract supersedes all oral arrangements, is the case decided, after our brief was prepared, of *Bradford v. Southern California Pet. Co.*, 62 A.C.A. 538, 145 P. (2d) 36, hearing in Supreme Court denied.

We urge and conclude that the judgment of the District Court should be reversed as

1. The contract is unambiguous.

2. Charges admittedly Soule's were not credited to Union.

3. Soule should have rescinded the contract or given notice it expected payment in accord with its interpretation either in July, 1940, or at the latest the following October when it admitted knowledge of being charged for the falsework.

4. Extraneous evidence should not have been admitted to alter the terms of the written contract especially conversations occurring 3½ years before they were testified to.

5. If the charges for falsework were arbitrarily or unfairly made between the parties, the District Court should be instructed to ascertain what was a fair apportionment of these charges.

Dated, San Francisco,
June 9, 1944.

Respectfully submitted,
DION R. HOLM,
HENRY F. WRIGLEY,
Attorneys for Appellants.